IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.244 OF 1989.

1. Sambha Dhondi Vhargar

2. Yeshodabai Dhondi Vhargar

3. Panda Dhondi Vhargar

4. Ram Dhondi Vhargar

5. Dhurpa Narayan Bhusnar

6. Laxman Dhondi Vhargar

all residents of Hatkar Mangewadi, Tal : Sangola, Dist : Sholapur .. Appellants
(Orig. Defendants 1, 4 6 to 9)

vs.

1. Sau Akkatai Mahankali Bhusnar

2. Tuka Dhondi Vhargar

3. Maruti Dhondi Vhargar

4. Vithabai Maruti Bhusnar .. Respondents.
(Original Plaintiffs)

Shri D.S.Sawant, Advocate for the Appellants.

Shri Ranjit V.More, Advocate for the Respondent No.1.
Shri R.R.Salvi, Advocate for Respondent Nos. 2, 3 & 4.

CORAM ; S.R.SATHE, J.

DATED ; 2nd Dec., 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Additional District Judge, Solapur in Civil Appeal No. 245 of 1984 whereby the order passed by the Court of CJJD, Sangola, in regular Civil Suit No.118 of 1978, partly decreeing plaintiffs suit and directing the defendants to give partition and separate possession of the suit property bearing gut nos.92, 85, 79, 76, 115, 101 and 97 to plaintiff was confirmed and appeal was dismissed, the original defendants have preferred this appeal. For the sake of convenience, hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to his appeal are as under :

. According to plaintiff the suit properties described in detail in paragraph no.1 of the plaint were initially owned by Genu Vhargar. It

was his ancestral property. He died leaving behind two sons namely Dhondu and Shankar. The suit property was thus joint property of Dhondu and Shankar. After the death of Genu, Dhondu died leaving behind his wife Yashoda i.e. original defendant no.4 and her children defendants 1 to 3 and defendants 5 to 9. After the death of Dhondu, Shankar, the father of present plaintiff died in the year 1978. Plaintiff and defendants were jointly cultivating the suit property. However, defendant no.1 got his name entered in the record of rights and on that basis started obstructing the plaintiff in her common wahiwat. Plaintiff, therefore, filed Regular Civil Suit No.118 of 1978 in the Court of Civil Judge JD, Sangola, for partition and separate possession of her one half share in the suit property.

3. The defendant no.1 and defendant nos.4 to 9 filed their joint written statement at exhibit 35 and opposed the suit claim. The defendants admitted their relationship with plaintiff. However, contended that the suit lands were never the ancestral lands of plaintiff and defendants

and plaintiff’s father was not having any share in the same. At the age of 18 plaintiff’s father Shankar went to Khandesh and lived there for about 50 years. Late Genu was having very meagre ancestral land and the same was not of good quality. The father of defendants 1 to 3 and 5 to 9 was doing business of selling she goats. Out of the said income he purchased the disputed property. Thus, according to defendant except the land bearing block No.99, the rest of the lands were purchased by Dhondi and it was his self acquired property. They therefore contended that plaintiff is not having any right, title and interest in the same. The defendants further contended that Dhondi looked after the the maintenance of plaintiff and he even met the marriage expenses of plaintiff. Late Shankar had love and affection for defendants 1 to 9 and as a result of the same he relinquished 3/4th share out of the ancestral land bearing block no.97 in favour of Dhondi and kept only 1/4th land of block no.97 in his name and accordingly entries were made in the record of rights. Thus, according to defendants the partition of the ancestral land had

already taken place between Dhondi and Shankar and as such plaintiff was not entitled to ask for partition. The defendants also contended that there are other sharers in the lands bearing block No.98, 93, 102 and 99. The said sharers are not joined in the suit for partition and as such the suit is bad for non joinder of necessary parties. Hence on all these grounds the defendants prayed for dismissal of suit.

4. On these pleadings the learned trial judge framed issues at exhibit 36. In order to prove the suit claim plaintiff examined herself at exhibit 48 and also produced Central extracts and extracts of 6(d). As against this the defendants Sambha Dhondiba Vhargar examined himself for all the defendants at exhibit 64. After considering the evidence of both the parties the learned trial judge came to the conclusion that plaintiff has proved that the suit properties bearing block nos.92, 85, 79, 76, 115, 101 and 97 are the joint family properties and plaintiff is having 1/2 share in the same. The trial judge also held that the suit is not bad for non joinder of necessary

parties. Accordingly he passed decree for partition and possession.

5. The defendants challenged the above mentioned order of the trial judge by filing Civil Appeal No.245 of 1984 in the Court of District Judge, Solapur. After hearing the arguments of both the learned advocates, the learned Additional Judge, Solapur, came to the conclusion that the judgment and order passed by the Civil Judge JD, Sangola was legal and correct. He, therefore, dismissed the appeal with cost.

6. It is this order that is being challenged by the defendants in this appeal. From the perusal of the record it appears that while admitting this appeal this Court, on 26.4.1989 has passed the following order " Is it necessary to prove that the nucleus was sufficient to purchase the properties. Admit."

7. Shri D.A.Sawant, learned Advocate for the original defendants has urged only one point. he submitted that only the property bearing block

no.97 was ancestral property and the remaining property was purchased by Dhondi, the father of defendants 1 to 3 and 5 to 9. When it was the case of the plaintiff that the other properties were also joint family properties it was necessary for the plaintiff to show that there was sufficient nucleus available to purchase the remaining properties. However, the plaintiff has not adduced any evidence in that behalf and as such it be held that except block no.97 rest of the properties were self acquired properties of deceased Dhondi. He further submitted that the finding recorded by both the courts below are not legal and correct and as such the appeal be allowed and plaintiffs suit be dismissed. As against this, the learned Advocate for the plaintiff supported the judgment and order passed by the courts below.

8. The relation between the parties is not in dispute. Admittedly, even according to the defendants at one point of time there was a joint family of plaintiff and defendants, or rather of plaintiff’s father and father of defendants. It

is the contention of the defendants that partition had taken place between Dhondi and Shankar. It is needless to say that generally speaking the normal state of every hindu family is joint. Presumably every such family is joint in food,, work, worship and the estate. In the absence of proof of division such is the legal presumption. Naturally, when any particular party asserts that partition has already taken place in respect of the joint property, the burden lies on the party asserting it. So, in the instant case we have to find out whether defendants have adduced sufficient evidence to show that partition as alleged by them had taken place between Dhondi and Shankar i.e. plaintiff’s father. Besides the bare word of defendant there is absolutely no other evidence to show the alleged partition. It is true that in respect of land bearing block no.97 there appears to be some division because name of Shanker is shown as owner of 1/4th share, while the name of his brother Dhondi is shown as the owner of 12 anna hissa i.e.3/4th share. However, one does not know on what basis the said entry has been made. Besides this if really this

entry would have been made by virtue of any partition then we would have found name of Dhondi and Shanker for equal share. It is tried to be suggested that late Shanker had relinquished his right in respect of the said land in favour of Dhondi. But for this also the defendants have not adduced any cogent and convincing evidence, so both the courts below have rightly held that the defendants had failed to show that partition had taken place at any time between Dhondi and Shankar, or thereafter between plaintiffs and defendants.

9. Once it is held that defendants have failed to prove their case of previous partition then we have to find out as to whether the suit properties are the joint family properties. It is the contention of the defendant that except block no.97 rest of the properties are self acquired properties of late Dhondi. Here again the burden lies on the defendants to prove their contention. It is the case of the defendants that Dhondi purchased the other properties under three sale deeds. However, it must be noted that the said

sale deeds are not at all produced by the defendants on record. The defendants have produced the certified copies of the mutation entries no.710, 731 and 784 at exhibit 67 to 69 respectively to show that the said properties have been purchased by Dhondi from one Prabhakar Deshpande, Shankar Deshpande and Shripati Husnawar. However, if we carefuly peruse the same we find that the survey no. entry in the said mutation entry is different and there is absolutely not an iota of evidence to show that the lands mentioned in the above mentioned three mutation entries are the suit properties. On the contrary the 7x12 extracts and the extract of C.D which are on record clearly go to show that the said lands were initially standing in the name of Genu i.e. father of late Dhondi and Shanker. After the death of Genu, the name of defendant was shown in the records of rights as manager or karta of joint family. So, even if we see the 7x12 extract which are at exhibit 52 to 56 and 58 and the mutation entry no.28 at exhibit 60 we find that the name of defendant was shown in the same as heir of Genu . Infact, plaintiff, father of

Shanker was also heir of late Genu and his name should have been entered in the said extracts, but that has not happened. But the fact remains that as the said lands were initially standing in the name of Genu, it must be held that the said lands are the joint family properties of plaintiff and defendants. There is also no evidence on record to show that the said lands which were initially standing in the name of Genu and then the same were purchased by Dhondi. The evidence on record goes to show that the transactions mentioned in the mutation entries no. 710, 721 and 784 have taken place on 20.1.1956, 11.6.1957 and 20.12.1961 respectively. It is also admitted that Genu died on 16.11.1972 and after his death Dhondu died on 15.12.1982. So, the defendants have infact not proved that the lands mentioned in the said mutation entries are the suit land. Nor there is any evidence to show that at the relevant time defendant was having any particular income and he was in a position to purchase the said properties.

10. As the evidence on record clearly goes to show that all the suit properties are the

ancestral properties of plaintiff and defendants, the question of Dhondi acquiring some of the properties out of his own income does not arise. As there is no sufficient evidence to show that any of the suit properties were purchased by Dhondi or by his heirs the question of plaintiff proving that there was sufficient nucleus to purchase the said properties i.e. properties other than block no.97 does not arise. Besides this, in the instant case even according to defendants the land bearing block no.97 was the joint family property. Thus, admittedly there was a nucleus. No other source of income is disclosed by the defendant. Except the bare words that Dhondi was doing the business of selling she goats there is no evidence. It must be presumed that the nucleus was sufficient to purchase the other properties. So, under such circumstances if defendants are claiming that except gut no.97 other properties are self acquired properties of Dhondi, the burden was upon them to prove the same, but when we find that defendants have not adduced any evidence in that behalf the presumption that the property was joint family

property must prevail. Thus, from the foregoing discussion it is very clear that both the courts below have properly appreciated the evidence on record and have correctly held that the plaintiff has proved that the suit property i.e. the lands bearing nos. 92, 85, 79, 76,115, 101 and 97 was the joint family property of plaintiff and defendants and as plaintiff was having 1/2 share in the same, plaintiff was entitled for partition and separate possession. The findings recorded by both the courts below are legal and correct.

11. In this view of the matter there is no substance in the appeal. The appeal is dismissed with cost.

(S.R.Sathe, J)